IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEFFREY LLOYD FLOWERS, Appellant.	No. 38251-2-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — On June 5, 2008, a jury entered guilty verdicts for Jeffrey Flowers on unlawful possession of a controlled substance with intent to deliver (methamphetamine), unlawful use of drug paraphernalia, and two counts of bail jumping. Flowers appeals his possession with intent to distribute conviction, arguing that the trial court improperly admitted prejudicial evidence of a note found on Flowers's person. He also appeals the possession with intent to distribute conviction and one bail jumping conviction on sufficiency of evidence grounds. In a statement of additional grounds for review (SAG),[1] Flowers argues that sufficient evidence also does not support his drug paraphernalia conviction, the police performed a pretext stop leading to his arrest and convictions, the State's charging information did not provide him

[1] RAP 10.10.

adequate notice, and the trial court gave defective jury instructions. We affirm, holding that (1) any error in the admitting of the note evidence was harmless error, (2) that substantial evidence supports all convictions, and (3) that the trial court's jury instructions were proper. All other challenges are meritless and are dismissed. Accordingly, we affirm.

FACTS

Around 1:00 am on May 27, 2007, Deputy Robert Tjossem of the Pierce County Sheriff's Department saw Flowers's car back out of Tammy Scholz's driveway. Tjossem did not see current registration tabs on the car and ran a check on the license plate number. Tjossem learned the vehicle registration had expired and stopped the car as it turned into a cul-de-sac near Scholz's home.

Flowers admitted to Deputy Tjossem that his license was suspended and that he did not have the vehicle's registration or insurance. Flowers initially refused to exit the car, asked if he could empty his pockets before getting out of the car, and asked to be allowed to return the car to Scholz's driveway. Flowers eventually got out of the car after turning it off with a screwdriver stuck in the ignition. Tjossem then handcuffed Flowers and arrested him for driving with a suspended license. Deputy Andrew O'Neil arrived within 30 seconds of the stop, walked Flowers to his patrol car, and read Flowers his *Miranda*[2] rights. Meanwhile, Tjossem searched the interior of the car and discovered a knife in a box on the front seat and a methamphetamine smoking pipe with reside in it on the driver's side floorboard.

Deputy Tjossem watched Deputy O'Neil perform a pat-down frisk search incident to Flowers's arrest. On Flowers's person, O'Neil found a small black pouch containing five unused

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

one-inch by one-inch plastic baggies, two similarly-sized baggies containing a white powdery residue, and one similarly-sized baggie containing a small crystal rock. When asked about the crystal rock, Flowers responded, "it [is] meth and had [I] known it was in [my] pocket [I] would have smoked it." 2 Report of Proceedings (RP) at 162. Tjossem used a field test kit on a small amount of the rock to test if it was a controlled substance or illegal narcotic. A forensics lab later confirmed the rock and baggie residues were methamphetamine and found the weight of the rock, outside of the baggie, as 0.1 grams. Upon further search of Flowers's person, O'Neil found a digital gram scale with untested residue on it, a collapsible baton similar to the weapon used by law enforcement, and a piece of paper with various handwritten notes, including a name and phone number written in black ink and "10 OXYcotton 20 " written in blue ink.[3] Ex. 6A.

On May 29, 2007, Pierce County charged Flowers with one count of unlawful possession of a controlled substance with intent to deliver (methamphetamine), one count of unlawful use of drug paraphernalia, and one count of third degree driving with a suspended license.

On September 13, 2007, Flowers posted bail and on September 20, 2007, signed a scheduling order that directed him to appear in court at 1:00 pm on October 2, 2007, for a pretrial conference. Jesse Williams, the barrel deputy for the trial court on October 2, 2007, testified that Flowers failed to appear in court that day.

On December 18, 2007, Flowers signed another scheduling order that directed him to appear in court for a continuance hearing on January 8, 2008. Neil Horibe, the barrel deputy for

[3] "10" is enclosed in a box and "5" is enclosed in a circle and could be the letter "S." While both parties and the entire record repeatedly indicate that a dollar sign exists before the "20 " no such dollar sign exists.

the trial court on January 8, 2008, testified that Flowers failed to appear in court that day.

Trial commenced on May 29, 2008. Pierce County amended Flowers's charges by dropping the driving with a suspended license charge and adding two bail jumping charges. Flowers moved in limine to exclude from evidence (1) the knife found during Deputy Tjossem's search of the car, (2) the collapsible baton found on Flowers's person, and (3) the OxyContin note found on Flowers's person. Flowers argued that the two weapons were not relevant evidence and their admission at trial would unfairly prejudice him because none of his charges included weapon enhancements. Flowers argued that the OxyContin note should be excluded because the State did not file any charges related to OxyContin. The trial court granted only Flowers's motion to suppress the knife. Following a CrR 3.6 hearing, at which Flowers argued that the police performed an unlawful pretext stop, the trial court ruled the stop, search, and arrest lawful. After a CrR 3.5 hearing, at which Flowers argued the timing of his *Miranda* warnings, the trial court concluded that Flowers made all statements regarding drugs and drug paraphernalia after receiving *Miranda* warnings.

On June 5, 2008, the jury entered guilty verdicts on all charges. On September 5, 2008, the trial court sentenced Flowers, who had an offender score of 21, to 72 months confinement and 9 to 12 months of community custody on the unlawful use and possession with an intent to deliver conviction. The trial court imposed concurrent lesser sentences on the two bail jumping convictions and a suspended sentence on the drug paraphernalia conviction. Flowers filed a timely appeal in which he raises various challenges to each of his convictions except the January 8, 2008 bail jumping conviction.

ANALYSIS

ER 404(b)

Flowers challenges the trial court's refusal to exclude the OxyContin note under ER 404(b), claiming the note is overly prejudicial propensity evidence. The State argues that the note is circumstantial evidence of Flowers's intent to distribute and that any error in its admittance is harmless. We agree that any error in admitting the note was harmless.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). Evidence of other bad acts may be admissible for other purposes, such as proof of motive, intent, or preparation. ER 404(b); *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). We review a trial court's decision to admit or refuse evidence under an abuse of discretion standard. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant, here Flowers, bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

Here, the OxyContin note was properly admitted as evidence of Flowers's intent to distribute. Pretrial, the State argued for the note's admissibility:

> [Defense] counsel's correct . . . there was no charge as it relates to OxyContin; he was not found to possess any OxyContin. Obviously there was no probable cause, therefore, to charge it.
>
> However, it does also go to the fact that . . . this is a person who is possessing drugs with the intent to deliver, and here is some reference information as to the price of another controlled substance. . . [I]t seems to fit with the concept of the State's theory he was dealing drugs.

1 RP at 6-7. And the trial court explained its decision to admit the evidence as follows:

> I [will] allow the testimony regarding the paper with the OxyContin [note]. . . . Certainly if there are other items of potential evidence that connect you to [a] drug lifestyle or potential delivery of drugs, that's highly relevant to what's in question. I think that's fair game when someone has these things on them when they are arrested. I don't think that's overly prejudicial. Certainly does go to the element the State has to prove that there was possession with the intent to deliver.

1 RP at 8.

Here, the State offered the OxyContin note as evidence of Flowers's intent to deliver and limited the evidence as permitted by ER 404(b). While Flowers had no OxyContin on his person at the time of the arrest, the note provides some evidence of Flowers's drug delivery intent. The trial court properly admitted the OxyContin note as proof of Flowers's intent.

Regardless, any error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Where the error is from a violation of an evidentiary rule, not a constitutional mandate, we do not apply the more stringent "harmless error beyond a reasonable doubt" standard. *See State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). "Rather, we apply the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Tharp*, 96 Wn.2d at 599; *accord State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, the State presented strong evidence of Flowers's intent to deliver methamphetamine, including the digital scale with residue on it, five unused baggies, two baggies with methamphetamine residue, and a baggie containing a small rock of methamphetamine—all found on Flowers's person. We hold that any error in admitting the OxyContin note is not a prejudicial error because it is within a reasonable probability that the jury would still have convicted Flowers of possession with intent to deliver methamphetamine based on the other evidence presented by the State.

Sufficiency of Evidence

Flowers next argues that sufficient evidence does not support either of his drug convictions or the October 2, 2007 bail jumping conviction. We disagree.

A. Standard of Review

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

B. Unlawful Possession of a Controlled Substance With Intent to Deliver

In order to prove unlawful possession of a controlled substance with intent to deliver, the State must show that Flowers (1) unlawfully possessed (2) with intent to manufacture or deliver (3) a controlled substance, in this case methamphetamine. RCW 69.50.401(1).

Flowers concedes possession of methamphetamine but argues that 0.1 grams of

methamphetamine is not a sufficient amount to support the element of intent to deliver. Also, in his SAG, Flowers appears to argue that the State's failure to present evidence of a named person to whom he planned delivery of the drugs precludes a conviction on an intent to deliver charge. The State argues that Flowers possessed a marketable amount of methamphetamine as required under Washington law. Substantial evidence supports the unlawful possession with intent to deliver conviction.

Flowers cites no authority to support his argument that there is a minimum amount of a controlled substance required to prove the intent to deliver element of this crime. The law is to the contrary. Our Supreme Court held that "it has never been suggested by any court that a large amount of a controlled substance is required to convict a person of intent to deliver." *State v. Goodman*, 150 Wn.2d 774, 782-83, 83 P.3d 410 (2004). In *Goodman*, our Supreme Court upheld an intent to deliver conviction involving 2.8 grams of methamphetamine. 150 Wn.2d at 783-84. Division Three of the Court of Appeals affirmed an intent to deliver conviction where the defendant had 2.0 grams of methamphetamine. *State v. Zunker*, 112 Wn. App. 130, 133, 48 P.3d 344 (2002), *review denied*, 148 Wn.2d 1012 (2003). While the quantity of drugs alone may not be sufficient to establish intent to distribute, the fact that the amount of drugs is small does not invalidate a jury verdict of an intent to deliver if corroborating circumstances exist. *Zunker*, 112 Wn. App. at 137-38. Thus, the central question is whether corroborating evidence is present to support Flowers's conviction because mere possession is insufficient to support an inference of intent to deliver. *See Goodman*, 150 Wn.2d at 782-83; *State v. Darden*, 145 Wn.2d 612, 624-25, 41 P.3d 1189 (2002); *Zunker*, 112 Wn. App. 135-38.

Here, Flowers had 0.1 grams of methamphetamine on his person at the time of his arrest.

Deputy Tjossem testified that "the baggie with the large crystal was probably for sale or hadn't been consumed yet" and that it was not an uncommon amount of methamphetamine to be sold based on his experiences.[4] 2 RP at 161. Flowers also had a digital gram scale and five unused baggies on his person at the time of his arrest. Additionally, as we have already held, the Oxycontin note provides evidence of Flowers's intent to deliver. This is sufficient evidence to support the jury's guilty verdict that Flowers unlawfully possessed methamphetamine with the intent to deliver.

To address Flowers's SAG argument, we note that evidence of a specific person intended to be the recipient of the drugs is not required. Again, the elements of an intent to deliver charge are only (1) unlawful possession (2) with intent to manufacture or deliver (3) a controlled substance. RCW 69.50.401(1).

C. Bail Jumping

In order to prove bail jumping under RCW 9A.76.170, the State must show that the defendant "(1) was held for, charged with, or convicted of a particular crime; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required." *State v. Downing*, 122 Wn. App. 185, 192, 93 P.3d 900 (2004).

Flowers challenges only the sufficiency of the State's evidence of his failure to appear. He argues that barrel deputy Williams did not have personal knowledge that he failed to appear for

[4] Flowers relies on Deputy Tjossem's testimony that 1/16 of an ounce (about 1.77 grams) is the "most popular amount" of methamphetamine purchased on the street to argue that the amount found on him, 0.1 grams, is too small to sell. 2 RP at 181. While 0.1 grams of methamphetamine may not be the "most popular amount" bought or sold, Tjossem testified it was a marketable amount. To the extent Flowers challenges Tjossem's credibility, we do not review credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

his pretrial conference at the ordered 1:00 pm time because Williams only polled the courtroom once at 3:45 pm.[5] Flowers appears to assert that because pretrial conferences are not held in an actual courtroom, he did not need to actually appear in the courtroom and Williams should have checked for him in adjacent hallways and rooms. Our review of the record reveals sufficient evidence supports Flowers's October 2, 2007 bail jumping conviction.

Here, a September 20, 2007 scheduling order, bearing Flowers's signature, directs Flowers to appear in "Courtroom CD2/550" at 1:00 pm on October 2, 2007, for a pretrial conference. Ex. 14. The motion for a bench warrant indicated barrel deputy Williams polled the gallery at 3:45 pm for Flowers who failed to appear. During cross-examination, Williams stated:

> Just for clarification, usually I poll, it happens more than once. I have been actually more methodical in my motions, I will put the number of times and where -- what times we polled the gallery. When I was first doing these I would only put the very last time. But for [this] case, I would have polled the gallery, 3:45 is the last time when I asked the judge to issue the warrant.

3 RP at 305. Williams began a full rotation in the CD-2 court in January 2008, and, prior to that date, only occasionally covered these duties for others. On redirect, Williams further clarified that,

> I hadn't actually done a CD-1 or CD-2 rotation, I wasn't a felony prosecutor, I wasn't used to filling out the warrants and the motions. So I didn't provide as much detail as, you know, with experience you learn well more detail is always helpful.
>
> So I learned to include the multiple pollings instead of including the last time I polled, which is what I did in [this] case.

3 RP at 312. This is sufficient evidence to support that Flowers failed to appear in the CD-2 courtroom on October 2, 2007, at the 1:00 to 3:45 pm appointed time. To the extent Flowers

[5] Flowers asserts a court appearance time of 1:30 pm on October 2, 2007. The September 20, 2007 scheduling order directed Flowers to appear at 1:00 pm.

challenges Williams's credibility, we do not review credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

We note that Williams did not need to check outside of the courtroom for Flowers. The scheduling order explicitly directed Flowers to appear in the courtroom, not the adjacent hallway or any of the nearby conference rooms. Trial courts, many of which have extremely large dockets, do not have the duty or responsibility to track down parties. It is the responsibility of the parties to appear at the court-directed location at the court-appointed time regardless of the perceived relevance or accuracy of an order by a party.

D. Use of Drug Paraphernalia

To prove unlawful use of drug paraphernalia under RCW 69.50.412(1), the State must show (1) use of drug paraphernalia (2) to "process, prepare, test, analyze, pack, repack, [or] store" (3) a controlled substance. *See*, *e.g.*, *State v. Williams*, 62 Wn. App. 748, 751-52, 815 P.2d 825 (1991), *review denied*, 118 Wn.2d 1019 (1992). In his SAG, Flowers appears to argue insufficient evidence for his drug paraphernalia conviction because the State proved *possession* but not *use* of drug paraphernalia. We hold sufficient evidence supports Flowers's use of drug paraphernalia conviction.

Here, Flowers had on his person a digital scale with an untested residue. At trial, Deputy Tjossem testified that the scale "looks fairly well used." 2 RP at 174. The police also found on Flowers's person eight one-inch by one-inch baggies, two of which had methamphetamine residue and one which contained a rock of methamphetamine. Based on this evidence, a rational trier of fact could conclude beyond a reasonable doubt that Flowers used the baggies for storage of drugs and used the digital scale to weigh drugs for packing or repacking. Each of these actions is a

violation of RCW 69.50.412(1) supporting Flowers's use of drug paraphernalia conviction.

Neither party raises a *Gant*[6] issue with regard to evidence obtained during Deputy Tjossem's vehicle search incident to arrest. First, we note that Tjossem could clearly see that Flowers turned off the vehicle using a screwdriver stuck in the ignition giving Tjossem probable cause to search the car for identification of the true owner. More importantly, the trial court suppressed—on other grounds—the knife seized during the vehicle search. In fact, the methamphetamine pipe is the only evidence obtained from the vehicle search admitted into evidence at trial. Evidence of the pipe was cumulative. The only charge which the pipe relates to is unlawful use of drug paraphernalia. Absent the pipe, the jury had before it (1) the digital gram scale with an untested white reside and (2) five new unused one-inch by one-inch baggies that could be used to contain methamphetamine as supported by the other three similarly-sized baggies which actually contained methamphetamine. All of this evidence Tjossem found on Flowers's person during the pat-down frisk search incident to arrest. Drug paraphernalia, as statutorily defined, includes scales and baggies.[7] A reasonable jury would still have reached a guilty verdict on Flowers's use of drug paraphernalia charge without the pipe evidence and so, even if preserved

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[6] *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

[7] Under RCW 69.50.102(a), "drug paraphernalia" means,

> all equipment, products, and materials of any kind which are used, intended for use, or designed for use in . . . packaging, repackaging, storing, containing . . . a controlled substance. It includes, but is not limited to:
>
> . . . .
>
> (5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;
>
> . . . .
>
> (9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.

for review, any error in admitting the pipe is harmless. ER 103(a)(1); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert denied*, 475 U.S. 1020 (1986).

Pretext Stop

In his SAG, Flowers argues that his traffic stop constitutes a pretext stop in violation of his constitutional rights against unreasonable searches and seizures. At a CrR 3.6 hearing, the trial court considered this argument and entered findings of fact and conclusions of law. Flowers's argument turns on factual disputes between his and Scholz's testimonies and the testimonies of Deputies Tjossem and O'Neil. The trial court entered findings against Flowers's view of the facts specifically citing credibility determinations as the basis for its decision. Credibility determinations are for the trier of fact and are not subject to review. *Camarillo*, 115 Wn.2d at 71. Because the trial court fully considered this argument and made findings and conclusions based on credibility determinations, which we do not review, this argument is meritless.

Sufficiency of Charging Documents

In his SAG, Flowers challenges the sufficiency of the State's charging information with regard to his drug charges, citing *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991), as authority. A *Kjorsvik* analysis is proper when a defendant challenges the sufficiency of the charging documents and whether the information adequately puts the defendant on notice of all the elements of the charged crimes. *See Kjorsvik*, 117 Wn.2d at 105-06, 109, 111. But Flowers does not raise a challenge of notice of his crimes due to inadequate charging documents. Instead, his challenge of the charging information is better characterized as a challenge that evidence does not support specific elements of his drug convictions. We have already reviewed the sufficiency

of evidence challenges for each of Flowers's convictions and decline to address them further here.

Jury Instructions

Finally, in his SAG, Flowers argues that jury instructions 9, 16, and 18 relieved the State of proving required elements of his drug convictions. Flowers's challenges to jury instructions 16 and 18 are actually arguments that the State did not provide evidence to support various elements of the drug charges. These challenges are more properly characterized as sufficiency of evidence challenges already addressed above. Flowers challenges jury instruction 9, arguing that this jury instruction fails to include an element requiring the State to show an intended recipient of the drugs for his intent to distribute charge. As already discussed, there is no such element for an unlawful possession of a controlled substance with intent to deliver charge. The elements of this crime are that a defendant (1) unlawfully possessed (2) with intent to manufacture or deliver (3) a controlled substance and are properly contained in jury instruction 9.[8] RCW 69.50.401(1).

[8] Jury instruction 9 states:

> To convict the defendant of the crime of possession with intent to deliver a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
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> (1) That on or about the 27th day of May, 2007, the defendant possessed a controlled substance;
>
> (2) That the defendant possessed the substance with the intent to deliver a controlled substance; and
>
> (3) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers at 21.

Accordingly, we affirm Flowers's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

VAN DEREN, C.J.